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BMW OF NORTH AMERICA, LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN MORRIS, and GLENN R.
SEMOW, On Behalf of Themselves and
All Others Similarly Situated,

Plaintiffs,

v.

BMW OF NORTH AMERICA, LLC,
Defendants.

CASE NO. C 07-02827 WHA

CLASS ACTION

**JOINT CASE MANAGEMENT
STATEMENT**

Date: September 20, 2007

Plaintiffs, Kevin Morris ("Morris"), Glenn R. Semow ("Semow") and Chad J. Cook ("Cook")(collectively "Plaintiffs"), and Defendant, BMW of North America, LLC ("BMW" or "Defendant"), through their respective counsel of record, respectfully submit this Joint Case Management Statement pursuant to Civil Local

1 Rule 16-9 and, in support thereof, state as follows:

2 **1. Jurisdiction and Venue**

3 This Court has jurisdiction over this matter pursuant to 28 U.S.C. §
4 1332(d)(2) because plaintiffs allege the matter in controversy, upon information and
5 belief, exceeds \$5,000,000, exclusive of interests and costs, and this matter is a class
6 action in which certain class members are citizens of states other than those of
7 Defendant. There are no issues with respect to venue or personal jurisdiction and all
8 parties to the action have been served.

9 **2. Facts**

10 Plaintiffs have commenced this class action against Defendant alleging
11 statutory violations in connection with the design, manufacture, marketing and
12 distribution of 2006 and 2007 BMW 3 series vehicles equipped with run-flat tires
13 manufactured by Bridgestone Firestone North American Tire, LLC ("subject
14 vehicles"), alleging, *inter alia*, that the tires on the subject vehicles wear
15 prematurely. Plaintiffs further assert that BMW, through the issuance of a technical
16 service bulletin ("TSB"), has implemented a secret warranty program, whereby it
17 pays for certain parts and labor charges associated with replacing the prematurely
18 worn tires, but that it has failed to provide notice of the program to Plaintiffs and
19 class members. Plaintiffs have asserted claims, individually and collectively, under
20 the Unfair Competition Law ("UCL" or "Section 17200"), Business and Professional
21 Code § 17200 *et seq.*, the California Secret Warranty Act ("Secret-Warranty Act"),
22 Civil Code § 1795.90 *et seq.*, the Consumer Legal Remedies Act ("CLRA"), Civil
23 Code § 1750 *et seq.* and the Song-Beverly Act, Civil Code § 1790 *et seq.* BMW
24 denies Plaintiffs' claims and denies that the subject vehicles and/or accompanying
25 tires were defective in any respect, or that Defendant acted in violation of any
26 applicable law.

27 **3. Legal Issues**

28 Plaintiffs contend the principle legal issues include:

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- 1 (a) Whether BMW's issuance of the TSB, and concomitant failure to notify
2 Plaintiffs and class members of the TSB, constituted a violation of the Secret-
3 Warranty Act;
- 4 (b) Whether the run-flat tires are defective;
- 5 (c) Whether BMW's attempts to disavow liability for the premature tire
6 wear by exempting tire wear from its express warranty, in the face of its alleged
7 knowledge of the premature tire wear, constituted a violation of the CLRA;
- 8 (d) Whether BMW's conduct is unfair, fraudulent and illegal and violates
9 the UCL;
- 10 (e) Whether BMW's conduct constituted a violation of its implied warranty
11 under the Song-Beverly Act; and
- 12 (f) Whether Plaintiffs' claims are suitable for class treatment.
- 13 Defendant contends the principle legal issues include:
- 14 (g) Whether the BMW Tire Center Target Satisfaction Program is an
15 "adjustment program" within the meaning of Cal. Civil Code §1795.92(a).
- 16 (h) Whether the BMW Tire Center Target Satisfaction Program for certain
17 Turanza tires is an "adjustment program" for other types of tires (e.g., Potenza tires)
18 within the meaning of Cal. Civil Code § 1795.92(a).
- 19 (i) Whether it is "unconscionable" for an automobile distributor to exclude
20 tires from an automobile warranty.
- 21 (j) Whether an automobile distributor's warranty is a "contract" within the
22 meaning of Cal. Civil Code §1770(a)(19) (which makes it unlawful for any person
23 "in a transaction intended to result or which results in the sale or lease of goods or
24 services to any consumer" to "[i]nser[t] an unconscionable provision in [a] contract")
25 where a consumer purchases or leases an automobile from an independent dealer
26 and the consumer has no contact with, and provides no consideration to, the
27 automobile distributor.
- 28 (k) Whether a claim for breach of an implied warranty of merchantability

1 requires privity of contract between a plaintiff and defendant under California law.

2 (1) Whether an automobile driven safely and reliably is unfit for its
3 ordinary purpose and unmerchantable under California law because one or more
4 tires wear out.

5 **4. Motions**

6 BMW filed a Motion to Dismiss Plaintiffs' Complaint, which Complaint was
7 filed on May 31, 2007. By agreement of the parties, Plaintiffs filed an Amended
8 Complaint on August 31, 2007. BMW anticipates filing a Motion to Dismiss the
9 Amended Complaint. Plaintiffs anticipate filing a Motion for Class Certification
10 after a reasonable period for discovery. The parties have agreed upon a discovery
11 schedule, which is set forth in Section 17 below.

12 **5. Amendment of Pleadings**

13 Plaintiffs filed an Amended Complaint on August 31, 2007. The parties
14 propose the deadline for amending pleadings to be set for sixty (60) days before the
15 close of discovery.

16 **6. Evidence Preservation**

17 Plaintiffs have preserved all documents in their possession, custody and
18 control which relate to this action.

19 Defendant has communicated to those persons believed to potentially have
20 information related to the claims made in the suit the need to preserve all documents
21 that relate to the Bridgestone Turanza and Potenza run-flat tires of the 2006 and
22 2007 3 Series vehicles.

23 **7. Disclosures**

24 Plaintiffs do not propose any changes with respect to the timing, form or
25 requirements for disclosures under Rule 26(a) of the Federal Rules of Civil
26 Procedure and intend to make their disclosures under Rule 26(a)(1) on or before
27 September 20, 2007. Defendant does not propose any changes with respect to the
28 form or requirements for disclosures under Rule 26(a). Defendant proposes that the

1 time in which the parties should be required to make disclosures under Rule 26(a)(1)
2 should be deferred until Defendant answers. Defendant's position is that the parties
3 should not be required to undertake the burden and expense of disclosures unless
4 and until plaintiffs are able to file a viable claim that survives a motion to dismiss or
5 Defendant files an Answer rather than a motion to dismiss.

6 **8. Discovery**

7 Plaintiffs may seek to exceed the limitation on the number of interrogatories
8 and depositions per party but will only seek such leave if, after discovery
9 commences in this action, they reasonably determine that such leave is necessary.
10 Plaintiffs will present any such request to the Court by motion. Defendant does not
11 believe that discovery should commence until Defendant answers. Defendant's
12 position is that the parties should not be required to undertake the burden and
13 expense of discovery unless and until plaintiffs are able to file a viable claim that
14 survives a motion to dismiss or defendant files an Answer rather than a motion to
15 dismiss. Plaintiffs oppose Defendants' request for a discovery stay. Defendants
16 may seek to exceed the limitation on the number of interrogatories and depositions
17 per party but will only seek such leave if, after discovery commences in this action,
18 they reasonably determine that such leave is necessary. Defendants will present any
19 such request to the Court by motion.

20 Plaintiffs believe that discovery may or will be needed on the following
21 subjects:

- 22 the marketing and sale of the subject vehicles;
- 23 the number of subject vehicles sold in California;
- 24 the extent to which the tires on the vehicles are defective and subject to
- 25 premature wear.
- 26 the costs or expenses incurred by consumers in repairing or replacing
- 27 the tires;
- 28

the implementation by BMW of its secret warranty program and the provision, or lack thereof, to Plaintiffs and class members regarding the same; BMW's knowledge of the premature tire wear; and BMW's alleged defenses.

Defendant believes that discovery may or will be needed on the following subjects:

plaintiffs' maintenance of their vehicles including the tires; the type of driving plaintiffs did including loading of the vehicles; experience of purchasers/lessees regarding tire wear; expectations of purchasers/lessees regarding tire wear; experience of purchasers/lessees regarding expense of tire replacement; expectations of purchasers/lessees regarding expense of tire replacement; purchasers/lessees experience with run-flat tires; and purchasers/lessees reasons for selecting vehicles with Potenza or Turanza tires.

9. Class Actions

The parties have agreed to a proposed scheduling order, which includes a schedule for class certification (*see* Section 17 below).

10. Related Cases

The parties are unaware of any other related case pending in this district, or any state or other federal court at this time. The parties agree that should either party become aware of the pendency of a related action, they will notify each other and the Court of said action within ten (10) days.

11. Relief

By way of their action, Plaintiffs seek (1) an order certifying the case as a class action and appointing Plaintiffs and their counsel to represent the proposed class; (2) restitution and disgorgement, including interest; (3) compliance with the

1 Secret-Warranty Act, including compliance with the notice requirements contained
2 therein; (4) reasonable attorneys' fees and costs; and (5) such other relief as the
3 Court may deem just and proper. Defendant believes that Plaintiffs are not entitled
4 to any relief of any kind.

5 **12. Settlement And ADR**

6 The parties have complied with ADR L.R. 3.5 and timely submitted a
7 stipulation regarding alternative dispute resolution. Specifically, the parties have
8 agreed to utilize private mediation following completion of the briefing on
9 Plaintiffs' Motion for Class Certification, but prior to any adjudication on Plaintiffs'
10 Motion for Class Certification. The parties have also agreed that, if the
11 circumstances so warrant, they would consider utilizing the services of a private
12 mediator at an earlier stage in the litigation.

13 **13. Consent To Magistrate Judge For All Purposes**

14 The parties have considered and discussed the possibility of requesting that a
15 Magistrate Judge preside and have agreed that, in this case, they would prefer that
16 the Honorable William H. Alsup retain jurisdiction over this matter.

17 **14. Other References**

18 The parties do not presently believe that the matter is suitable for reference to
19 binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

20 **15. Narrowing of Issues**

21 The parties do not believe that any material issues can be narrowed at this
22 stage in the litigation, however, will work cooperatively to do so when and if the
23 opportunity arises.

24 **16. Expedited Schedule**

25 The parties do not believe that this case can, or should, be handled on an
26 expedited basis.

1 **17. Scheduling**

2 The parties propose the following case management schedule.¹

- 3 2/15/08 Plaintiffs to file any motion for class certification and expert
4 reports in support thereof; Plaintiffs to make such expert(s)
5 available for deposition within 30 days of the filing of the
6 motion.
- 7 4/15/08 Defendant to file any opposition to class certification and expert
8 reports in support thereof; Defendant to make such expert(s)
9 available for deposition within 30 days of the filing of opposition
10 to the motion for class certification.
- 11 6/16/08 Plaintiffs to file any reply in support of motion for class
12 certification
- 13 6/16/08 The parties will participate in private mediation following the
14 filing of Plaintiffs' reply brief and prior to an adjudication of
15 Plaintiffs' Motion.
- 16 8/15/08 Deadline for Plaintiffs' disclosure of merits-related experts
- 17 9/15/08 Deadline for Defendant's disclosure of merits-related experts
- 18 10/1/08 Deadline for completion of all non-expert discovery
- 19 11/3/08 Deadline for completion of all expert discovery
- 20 1/19/09 Trial

21 **18. Trial**

22 The parties both agree that the case will be tried to a jury. Plaintiffs believe
23 that the trial will take 7 to 10 days. Defendant believes that the trial will take 15
24 days.

25

26 ¹ Plaintiffs believe that this schedule is appropriate if discovery proceeds and is not
27 stayed. If discovery is stayed, Plaintiffs believe that any schedule would need to be
28 modified consistent with the length of the stay.


19. Disclosure of Non-Party Interested Entities or Persons

The parties have filed the "Certification of Interested Parties or Persons" required by Civil Local Rule 3-16.

DATED: September 13, 2007

**LEWIS, BRISBOIS, BISGAARD
& SMITH, LLP**

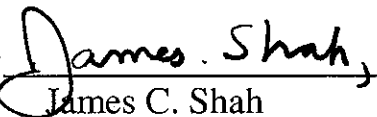
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DATED: September 13, 2007

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signed by
Jon Kardassakis
with authority
to sign from
James Shah

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 221 North Figueroa Street, Suite 1200, Los Angeles, California 90012.

On September 13, 2007, I served the following document(s) described as

JOINT CASE MANAGEMENT STATEMENT

on all interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

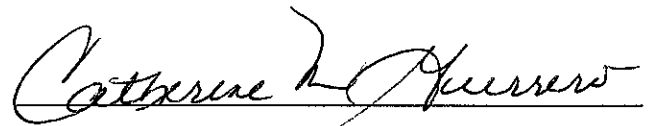
☒ (BY MAIL, 1013a, 2015.5 C.C.P.)

☐ I deposited such envelope in the mail at Los Angeles, California. the envelope was mailed with postage thereon fully prepaid.

☒ I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, this document will be deposited with the U.S. Postal Service on this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on September 13, 2007, at Los Angeles, California.



CATHERINE M. GUERRERO

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